Office-Supreme Court, U.S.
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SEP 28 1983
ALEXANDER L. STEVAS,
CLERK

82-1911

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

JAMES GRESHAM GIBSON, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT.

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QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court properly affirm Petitioner's conviction and sentence on the basis that Petitioner was denied a fair trial by the errors allegedly committed by trial counsel?

II.

Did the South Carolina Supreme Court properly uphold the trial judge's discretion to alter Petitioner's sentence pursuant to motion to reduce that sentence?

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Memorandum Opinion No. 83-MO-4, filed January 17, 1983, as reproduced in Petitioner's Appendix A at pages 25-26.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court properly affirm Petitioner's conviction and sentence on the basis that Petitioner was denied a fair trial by the errors allegedly committed by trial counsel?

II.

Did the South Carolina Supreme Court properly uphold the trial judge's discretion to alter Petitioner's sentence pursuant to motion to reduce that sentence?

ARGUMENT

I.

The South Carolina Supreme Court properly affirmed Petitioner's conviction and sentence, because Petitioner was not denied a fair trial based on errors allegedly committed by trial counsel.

On appeal to the South Carolina Supreme Court, Petitioner asserted that trial counsel erred in numerous particulars: (1) He failed to move for a continuance on the basis that Appellant's wife, a material witness who allegedly would have corroborated his alibi defense, was out-of-state; (2) He failed either to subpeona Steve Hinds, the "middle man" in the gun sale or to account for his absence; (3) He failed to inquire into what juror William Sims, a former detention center guard, knew about the case (Tr. p. 36, line 11-p. 37, line 23); (4) He did not object or request an instruction when the alternate juror was seated; (5) His direct examination of Appellant's mother, Mary Gibson, failed to establish she was driving Petitioner's dove gray Lincoln Continental when Steven Godfrey

and Shannon Ryan allegedly sold Petitioner five guns (Tr. p. 128, line 17-p. 135, line 8); and (6) He failed to object to the trial judge's determination that when the jury asked a question regarding Mrs. Mary Gibson's testimony, that only her direct testimony would be read. Trial counsel, according to Petitioner, made so many errors that Petitioner was denied the effective assistance of counsel and thus denied a fair trial.

The State maintains that this issue cannot be raised for several reasons. First, the failure to object to trial counsel's performance at trial means there was no record by which the Supreme Court could review the alleged ineffectiveness of counsel. Petitioner has the burden of presenting a sufficient record for the South Carolina

Supreme Court to review. State v. Winestock, 271 S.C. 307, 248 S.E.2d 307 (1978).

Secondly the failure to object contemporaneously to each of the alleged strategic errors precludes consideration of those errors on appeal. See cases collected at 7A West's South Carolina Digest, Criminal Law, Key Nos. 1028, et seq.

Thirdly, the alleged ineffective assistance of counsel is a collateral attack which should properly be raised by application for post conviction relief pursuant to Section 17-27-10, et seq. of the 1976 South Carolina Code.

Fourth, the South Carolina Supreme Court has held that an attempt "..to raise this point is to request this Court to hear the matter in our original jurisdiction. This is an appellate

court for the correction of errors of law committed at the trial level. This question was not pursued at the trial level, and we decline to try it now." State v. Williams, 266 S.C. 325, 336, 223 S.E.2d 38 (1976); State v. Carpenter, ___ S.C. ___, 286 S.E.2d 384 (1982). This question is meritless.

II.

The South Carolina Supreme Court properly upheld the trial judge's decision to alter Petitioner's sentence pursuant to Petitioner's motion to reduce that sentence.

Petitioner alleges the trial judge erred in ruling on his motion to reduce the sentence by increasing rather than decreasing it. This increased sentence, according to Petitioner, violated the due process, equal protection, and

double jeopardy clauses of the State and Federal Constitutions. Petitioner further contends the second sentence should be vacated and the original sentence imposed. He further contends it should be construed most favorably to him as a three year suspended sentence, so that his actual sentence is a three year term of probation.

Initially, Respondent notes the record reveals that no motion for new trial was made when the original sentence was imposed, and no modification of sentence was sought. The only objection on March 17, 1982 to the sentence of three years to be followed by three years probation was:

> Your Honor, I know you've made your ruling and handed down the sentence but in no way do we feel that if Mr. Gibson deserves that kind of time that would be of any benefit to him or to society, the people of Florence County, and

> we would ask that you take into consideration that he has no past- (Tr. p. 159, lines 16-21).

Respondent additionally notes that when the revised sentence was imposed, no motion for new trial was made on that basis, no objection to the sentence was made, and no modification of sentence was sought at that time. (Tr. p. 169, line 20-p. 170, line 14). Respondent therefore maintains the issue was not timely raised and therefore was not properly before the South Carolina Supreme Court. State v. Shumate, 276 S.C. 46, 275 S.E.2d 288 (1981).

However, even if the Court should find that Petitioner's March 18, 1982 motion to reduce sentence was sufficient to preserve the issue on appeal, Respondent asserts that the trial judge properly exercised his broad sentencing

discretion and that Petitioner benefitted thereby, because the actual time of incarceration was reduced to only one year. The record reveals the trial judge initially sentenced Petitioner thusly:

> I waived the $20 on indictment 81-675 to the Victim Restitution Fund. The sentence of the court is that the defendant be confined to the Department of Corrections for the State of South Carolina for a period of three (3) years and that you thereafter be on probation for a period of three (3) years. Of course, you're gonna have to pay the cost of probation while you're on probation. (Tr. p. 159, lines 8-15).

Pursuant to Petitioner's motion to reduce the sentence on March 18, 1982, the trial judge retained jurisdiction over the sentence. (Tr. p. 161, lines 15-18).

The record further reveals that at the hearing on March 25, 1982,

Petitioner's counsel informed the trial judge that his client, while still avowing innocence, was willing to make restitution in the amount of the stolen guns. (Tr. p. 164, lines 13-22). That amount was $2,000. (Tr. p. 169, lines 14-19).

After fully hearing Petitioner, the trial judge imposed this sentence:

> All right. The sentence of the court on indictment 81-675, after having reconsidered the sentence, taking into consideration that the defendant is a first offender, taking into consideration that the victims are out and at a loss of $2,000, although I don't favor changing a sentence once it has been imposed, I am going against myself by doing this, and the sentence on indictment 81-675 is that the defendant be confined to the Department of Corrections for the State of South Carolina for a period of eight years, but I suspend that upon the service of one year, and that you thereafter be on probation for a period of five years. Of course, you

> are going to have to pay $1,200 for each year that you are on probation. And within thirty days after you begin your probation you are to pay $20 to the Victim Restitution Fund on this indictment.
>
> In addition to that and as a special condition of your probation, is that, within the first year of your probation period, you are to make restitution to Mr. Thomas Stroman in the amount of $2,000. (Tr. p. 169, line 20-p. 170, line 13).

Respondent maintains that the eight year sentence, suspended on service of one year, actually reduced Petitioner's sentence from the original three year term with no suspension, and that Petitioner's willingness to pay $2,000 restitution may have influenced the trial judge to reduce the active time to be served. Thus, the record reveals no abuse of the trial judge's discretion. See State v. Johnson, 119 S.C. 55, 110 S.E. 460 (1919), appeal dismissed, 257

U.S. 668, 42 S.Ct. 184, 66 L.Ed. 426 (1922).

Even if the issue is properly preserved for review, Respondent submits that the sentence is within the statutory limit of ten years for the misdemeanor of receiving stolen goods [Section 16-13-180 of the 1976 South Carolina Code (Cum. Supp. 1982); Section 17-25-30]; thus, the South Carolina Supreme Court lacked jurisdiction to alter the sentence. State v. Fogel, 256 S.C. 149, 181 S.E.2d 483 (1971); State v. Wharton, 263 S.C. 437, 211 S.E.2d 237 (1975). See cases collected at 7A West's South Carolina Digest, Criminal Law, Key Nos. 1147 and 1183. The issue is meritless.

Respondent therefore contends that the South Carolina Supreme Court acted in complete accord with State and

Federal law in upholding Petitioner's conviction and sentence. This Petition for Writ of Certiorari is therefore without merit.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT.